Spousal support under the Divorce Act: a new direction

Background Paper

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SPOUSAL SUPPORT UNDER *THE DIVORCE ACT:* A NEW DIRECTION

The past several decades have seen dramatic changes in the law of spousal support in Canada. Legislatures and courts have wrestled with social change, particularly new attitudes toward women and their roles in society, and the altered financial realities that have resulted from these attitudes and roles. In some instances, the legal system has attempted to recognize women as equal members of society in ways that have created harsh financial consequences, both for women and their children. This paper explores the most recent authorities on this subject, and examines the current policy issues facing Canadian judges and legislators.

BACKGROUND

Prior to 1968, only women were able to apply under the *Divorce Act* for spousal support, and wives were disentitled where they were proven guilty of adultery. The inability of husbands to sue for support represented a clear policy statement by Parliament on the roles assumed by the sexes during marriage. This aspect of the law was changed by the *Divorce Act, 1968* (S.C. 1967-8, c.24), which allowed either spouse to claim support from the other. It retained the conduct of the applicant as a factor to be considered in an award of spousal support, though not child support.

The *Divorce Act, 1985* (R.S.C. 1985, c. D-3.4) severed the tie between the parties' conduct and either spouse's entitlement to support. Similar adjustments were made in provincial matrimonial legislation throughout Canada. This reflected a recognition, perhaps premature, of changing roles within marriage for men and women. It accommodated the

possibility that husbands might be financially dependent on their wives, and was intended to make the law gender neutral in its application. Although such a change was clearly called for by advocates of women's equality, reality has not kept pace with this key demand. The rate of participation of women in the paid labour force has increased, but women continue to perform nearly all of the child-care and housework across Canada. In their paid jobs, women receive only two-thirds of the wages received by men. For the most part, judges have been slow to treat divorcing couples in a gender neutral way, perhaps making the impact of the legislative change felt more gradually. Nonetheless, the change has resulted in an exacerbation of the financial difficulties faced by many divorced and separated women in Canada.

The National Council of Welfare's 1979 report entitled *Women and Poverty* was updated in 1990 as *Women and Poverty Revisited*. This report makes specific reference to reformed divorce and matrimonial property legislation, as well as other legislative changes that changed the situation of women in the 1980s. It highlights the "shocking fact" that, in spite of the major changes in legislation, the proportion of women among Canada's poor has not changed noticeably. The group most at risk of poverty in Canada consists of single-parent families headed by women: 57% of this group live below the poverty line.

Marriage breakdown adversely affects women and children more than men. The courts' award of inadequate levels of spousal and child support orders and inadequate enforcement have been identified as the main causes of the poverty of many women and their children. Lawyers have reported that the 1985 *Divorce Act's* expectation of accelerated self-sufficiency of spouses after marriage breakdown is responsible for its harsh and unfair economic impact.

FEDERAL JURISDICTION REGARDING SPOUSAL SUPPORT

The issue of spousal support is resolved under the federal *Divorce Act*, and not under provincial legislation, wherever a divorce judgement is granted or has previously been granted. Provincial legislation applies only to support applications by unmarried cohabitees and to

married spouses who have not divorced and are not seeking a divorce. Other than the decree of divorce which ends the marriage, the *Divorce Act* provides for two forms of "corollary relief": support and child custody.

For making an application for a divorce under the *Divorce Act,* there must have been a breakdown of the marriage. Such breakdown is defined as including separation of the parties (for at least one year before the divorce judgement can be granted), adultery, or cruelty. Only when this requirement for breakdown is fulfilled can an application for support be made under the Act. The Act defines a spouse as either of a man and a woman who are or were married to each other. A claim for support under the *Divorce Act* may be made by a spouse only as a corollary to a claim for a divorce (unless the divorce has already been granted), and it will be granted only after the divorce is granted. The *Divorce Act* does provide for interim support to be ordered for the duration of the divorce action, but if there is no divorce decree, permanent support will not be granted.

Unlike most provincial family law legislation, there is no limitation period within which a claim for spousal support must be commenced under the *Divorce Act.* However, there may well be an onus on a claimant to explain any lengthy delay in applying for support. In the absence of a satisfactory explanation, an applicant could be denied spousal support.

THE CRITERIA UNDER THE *DIVORCE ACT*

The predecessor *Divorce Act* provided the following test for the court's use in the determination of the amount of support which should be paid to the dependent spouse: the court will order support of a certain amount "if it thinks it fit and just to do so, having regard to the conduct of the parties and the conditions, means and other circumstances of each of them." More elaborate principles evolved in the cases decided under the 1968 *Divorce Act,* and they were often influenced by the more detailed provisions of provincial family law statutes.

Sections 15(5) and (7) of the *Divorce Act, 1985* provide much more detailed criteria, to some extent codifying developments in the case law under the predecessor Act:

> 15(5) In making an order under this section, the Court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including,
> (a) the length of time the spouses cohabited;
> (b) the functions performed by the spouse during cohabitation; and
> (c) any order, agreement or arrangement relating to support of the spouse or child.
>
> 15(7) An order made under this section that provides for the support of a spouse should:
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
> (d) insofar as predictable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Section 15(6) expressly provides that any misconduct of either spouse shall not be taken into account. Coupled with the move away from a means/needs test and to the criteria of subsections 15(5) and (7), the new *Divorce Act* provisions regarding spousal support are a dramatic departure. When read together, these new provisions allow the court to evaluate the specific features of each case, and the nature of each family and marital relationship. Section 15(7)(d) enshrines the legislative objective of economic self-sufficiency, which has given rise to some of the most controversial results, and has led to the development of the "clean break" theory of spousal support law, the "legally justifiable reason" test and the "causal connection" test in matrimonial litigation.

These tests, which have served to restrict the rights of dependent spouses seeking long-term or permanent spousal support, began to be developed almost a decade ago, but were strengthened in 1987 by three

decisions of the Supreme Court of Canada. Prior to 1987, there was already authority in Canada for the proposition that spousal support orders would not be awarded to outlive any connection between a spouse's inability to support himself or, more usually, herself, and the marriage. In other words, a financially dependent spouse was required to show a legally justifiable reason for his or her need for spousal support in order to establish an entitlement. In *Messier* v. *Delage,* [1983] 2 S.C.R. 401, the Supreme Court of Canada held that the fact of marriage does not create an entitlement to a pension for the financially dependent spouse. Because the wife's unemployment was in no way related to the marriage, an increase in the quantum of support was not justified. This case also illustrates the judicial perspective that spousal support is a private matter between the spouses, a perspective that has further narrowed the "legally justifiable reason" test.

INTERIM ORDERS

An applicant for spousal support may move for an interim order after the commencement of the divorce action. An interim order is temporary, lasting until further order of the court or the judgment (which is the final order) is rendered in the action. The case law in the area of interim support is currently in flux, with the courts resolving questions such as whether the causal connection test has any application at the interim stage of a proceeding and if so, whether the onus is on the support applicant to establish a causal connection, or on the payer spouse to show that there is no causal connection. Some decisions have held that the means and needs test is the one to be applied at the interim support stage, with consideration of the support motion being denied only if there is clearly no entitlement to support on the basis of a previous decree or agreement.

VARIATION

The issue of spousal support entitlement often arises in the context of an application to vary an existing order. Financially dependent former spouses may apply to vary either a court order or a separation agreement, and the courts have to wrestle with the degree of finality these provisions are to be afforded. Section 17 of the *Divorce Act, 1985* allows the court to vary a support order on application by either or both former spouses. The criteria and purposes of a variation order are set out in subsections 17(4), (7) and (8).

Before any variation can be made, the court must first be satisfied that there has been a change in the condition, means, needs or other circumstances of either former spouse. Section 17(4) has been interpreted to require that the court satisfy itself that there has indeed been such a change before deciding to exercise its discretion in favour of making a variation. It is the overall change in the parties' lives which must be considered, and not small changes which leave the parties in financial circumstances which are not very much different from what they were at the time of the granting of the divorce judgement. The policy objectives set out in section 17(7) must also be considered.

Until recently, the test applied by the courts in deciding whether the change is sufficient to warrant a variation was that applied under the *Divorce Act, 1968:* the change had to be "catastrophic, radical and unforeseen." More recent cases have required that the change be catastrophic, radical, unforeseen, and causally connected to the marriage, particularly where the variation application was made following a pre-divorce judgement separation agreement.

THE TRILOGY

Judgment was rendered in the Supreme Court of Canada's trilogy of spousal support cases, *Pelech, Caron* and *Richardson,* on 4 June 1987. The cases explored the scope of appellate review in family law cases, the factors which govern in spousal support applications, and the purpose of the law of spousal support.

The *Pelech* decision *(Pelech* v. *Pelech,* (1987) 7 R.F.L. (3d) 225) dealt with parties who had been divorced since 1969 when, in 1982, Mrs. Pelech applied to vary the support order under section 11 of the *Divorce Act, 1968.* Having exhausted her maintenance entitlement, and unable to work because of severe physical and psychological problems, Mrs. Pelech was on welfare at the time the application was made. Mr. Pelech, on the other hand, had increased his net worth since the divorce from $128,000 to $1,800,000.

Madam Justice Bertha Wilson, for the unanimous Court (although Mr. Justice La Forest chose to express his reasons in his own words) preferred the principle of finality in the settlement of the financial affairs of ex-spouses over the need to compensate for systemic gender-based inequality. She held that "where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled upon the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected." She upheld the right of the individual to end a relationship, and stated that the financial responsibility that arises upon marriage should not be treated as continuing indefinitely into the future.

The Court in *Pelech* held that a causal connection between the changed circumstances and the marriage must be shown before a court should intervene and set aside or vary the agreement of the parties. The decision had the effect of adding this third stage to the variation process under section 17 of the *Divorce Act, 1985;* the first two stages being the finding that there has been a change in circumstances, and the finding that the change was unforeseen at the time of the agreement.

In the *Caron* v. *Caron* case, (1987) 7 R.F.L. (3d) 274, the parties' separation agreement provided that spousal support was to cease if the wife cohabited with another man; the wife applied to the court for a reinstatement of support after it had been validly terminated by the husband under the terms of the separation agreement. The agreement contained a material change in circumstance clause which allowed the court to vary quantum of support only (not the entitlement itself). Because the

Court found that the support entitlement had ended by reason of a factor which was expressly considered in the agreement and was not causally connected to the marriage (the wife's cohabitation with another man) it was held that the Court did not have the power to reinstate support. Reinstatement of support, unlike a variation of quantum, was barred by the separation agreement.

The wife's spousal support application was also denied in *Richardson* v. *Richardson,* (1987) 7 R.F.L. (3d) 304, where she sought a divorce and an order for spousal support contrary to minutes of settlement in an earlier *Family Law Reform Act* action. Madam Justice Wilson, for the majority, held that a court should only override the spousal support terms of a valid settlement agreement in the event of a radical change in circumstances resulting from a pattern of economic dependency generated by the marital relationship. Although the wife was dependent upon public assistance at the time of her divorce action, this fact was held not to in itself justify variation of the agreement.

Mr. Justice La Forest dissented in *Richardson,* holding that the parties to a divorce action cannot oust the jurisdiction of a judge to award spousal support on divorce. Although their settlement agreement was an important factor to be considered, he felt it did not bind the trial judge.

Although they did not create it, the decisions of the Supreme Court of Canada in the trilogy were referred to and followed as having established the "clean break" theory of support law and the causal connection test. Professor James McLeod's annotation to the *Pelech* case (7 R.F.L. (3d) 226) emphasized the significance of the "advancement" these decisions represented, and suggested that the trilogy reasoning would be influential not just in variation cases, but also in originating applications for support. His annotation argues that the cases set out a support model which emphasizes the "individualistic nature" of the support obligation, stressing the idea that parties freely enter and leave marriages, and negotiate their own arrangements as equals.

The application of the causal connection test in originating support applications has been the subject of controversy across Canada

since the trilogy was released, particularly in cases of long-term, traditional marriages. In these marriages it was difficult to justify the application of the individualistic model of marriage and marriage breakdown, especially in the face of the reality of financially dependent women, and women for whom self-sufficiency seems unrealistic. In view of the economic realities faced by women who have been absent from the paid work force for many years, courts began to assess "self-sufficiency" at a mere survival level. A wife's poverty-line income, though often deemed adequate for the purpose of terminating spousal support, was in stark contrast to the standard of living she had enjoyed before separation, and to the income of her former husband, whose material wealth increased significantly after separation in almost all cases.

The harsh decisions resulting from the application of the clean break approach even in cases of long-term, traditional marriages were not restricted to those cases decided in the courts. Counsel in many other cases recommended settlement packages to clients which reflected their uncertainty about the amount and duration of support a court would order. This was so even in cases where the likelihood of the wife's becoming self-sufficient was slim. Thus, many negotiated settlements concluded since 1987 bear the stamp of the harsh causal connection test.

WHERE ARE WE NOW?

Madam Justice Beverley McLachlin, in her keynote address to the National Family Law Program in Calgary on 2 July 1990 *(Canadian Journal of Family Law,* Vol. 9, Fall 1990, p. 33), discussed the controversy surrounding the law of spousal maintenance. Although she supported the reform of matrimonial law in Canada in the 1980s, Madam Justice McLachlin said that the law has been changed too quickly, so that it has outpaced the reality of the situation with respect to men and women in Canadian society today.

New legislation "embraced the promotion of economic self-sufficiency and self-reliance upon separation" with the goal of allowing the parties to be economically independent as quickly as possible to permit

the termination of relations between them. Madam Justice McLachlin saw these values as being reflected in the Supreme Court's decisions in the trilogy. The *Pelech* decision underlined the individualism of the parties: they have the freedom to act, to negotiate, to claim or alienate their rights, and to choose their own outcome. These values, maximizing the sovereignty of each spouse, were appropriate for the "joint venture" model of marriage, which is based on the assumption that men and women function equally in economic matters. Although this equality is an ideal, it is "tragically untrue for a large number of women in our society."

As Madam Justice McLachlin pointed out, the clean break approach is not appropriate for long-term, traditional marriages, which she identified as the "union for life" model. Wage equality is not a reality for all Canadian women, particularly those who have been out of the paid labour force for some time. This undermines the reliability of the trilogy's assumption of the equal bargaining power of separating spouses. The Court should not bind itself to "inapplicable liberal stereotypes" but must recognize "real inequality" when it sees it.

This suggestion -- that the courts should assess the economic realities facing each separating couple individually -- permits us to work toward economic equality as a society without penalizing unjustly those who do not have the benefits of it. Very recent caselaw supports the idea that spousal support has to be assessed in the context of the facts of each particular marriage and separation.

STORY V. *STORY*

The British Columbia Court of Appeal reviewed the application of the causal connection test in *Story* v. *Story* ((1989) 23 R.F.L. (3d) 225). The parties had been married 18 years, had two children, and had had a traditional marriage in the sense that the wife had ceased her employment on marriage and performed household management and child-care duties throughout the parties' cohabitation. The husband worked in paid employment. A decree nisi was granted in 1985, terminating the marriage and providing for maintenance for the wife, as well as child support. In 1988

the husband sought to terminate, or to vary the spousal maintenance order to provide for a termination date. By that time it was clear that the wife was unemployable as a result of the mental illness she had suffered throughout the marriage.

When the husband's application to vary was being considered by the British Columbia Court of Appeal, the fact that it arose under section 17 of the *Divorce Act* (because it was a variation and not an originating application) became important. Chief Justice McEachern found that the fact that there was now a known likelihood that Mrs. Story's disability would be a continuing one, was not a sufficient change of circumstances to permit a variation of the support order. Chief Justice McEachern reviewed the reasons for granting spousal support, as provided in section 15 of the Act, and noted that the breakdown of the marriage had left the wife seriously disadvantaged economically. He said that the most significant fact in the case was not Mrs. Story's mental illness, but her "economic dependency caused by a lack of training and employment experience prior to marriage and her role as homemaker for such a long period."

In an article commenting on the *Story* case *(Canadian Journal of Family Law,* Vol. 9, 1990, p. 143), Madam Justice Proudfoot of the B.C. Court of Appeal expressed her disagreement with the idea that the emphasis on individual responsibility and finality in relations between former spouses is a progressive development in gender equality. She indicated that this emphasis "often leads to a failure to appreciate the practical barriers to financial independence which confront many ex-wives" (p. 151). Rather than emphasizing the benefit to parties in an immediate termination of their relationship and obligations, Madam Justice Proudfoot suggested that the approach ought to recognize the economic disability that falls on many women who undertake the role of homemaker, and recognize the advantages that women's assumption of this role affords to their husbands.

LINTON V. *LINTON*

The "clean break" approach to spousal support has been weakened or abolished in Ontario, as well, as a result of the decision of the Ontario Court of Appeal in *Linton* v. *Linton* ((1990) 1 O.R. (3d) 1). The Lintons separated after a 24-year marriage, and divorced six years later. At the time of their trial, Mrs. Linton earned $17,000 as a secretary, and Mr. Linton earned about $140,000 as a senior executive with a major corporation. Mrs. Linton had worked at home until the couple's children were all in school.

The Court of Appeal reviewed in detail the Supreme Court of Canada trilogy and subsequent Ontario decisions. The objectives of Parliament in enacting the *Divorce Act, 1985* were also discussed in detail. Mr. Justice Osborne, writing for the unanimous Court, found that the support scheme established by Parliament reflects the judgment that valid support needs arise from the economic aspects of the division of responsibilities within the marriage. He held that an almost presumptive economic disadvantage arises upon the breakdown of a long-term marriage where one spouse has been absent from the paid workforce for a lengthy period. The objective of self-sufficiency must be assessed within the context of the particular marriage in order to recognize adequately the economic value of the functions of child care and household management, and the economic disadvantage accruing as a result of a long absence from paid work.

CONCLUSION

Parliament has seen fit to provide Canadian courts with a list of issues that should be considered in awarding spousal support in a divorce action. These issues have not been prioritized in terms of their relative importance, which, indeed, can be established only within the context of each particular case. In making a spousal support determination, the courts evaluate the contribution each spouse has made to the economic partnership, and attempt to ensure that neither is unfairly

economically disadvantaged as a result of marriage breakdown. Rules applied in a uniform, gender-neutral way cannot adequately protect against unfair economic disadvantage, because of the reality of the wage gap between men and women, which is exacerbated by the pattern of long-term absences from the paid labour market by wives and mothers.

In the three 1987 cases, the Supreme Court of Canada embraced the principle that divorcing spouses should be able to enter into agreements that would sever their relationship with the other spouse permanently, without the fear that the courts could intervene to throw their lots back together. These decisions recognized the desire of many Canadians that women should be treated as equals with men, able to determine their own destinies and fend for themselves. That desire has been found to be less compelling than society's desire to provide for former spouses equally on marriage breakdown, or at least to spread economic disadvantage fairly between both spouses. In today's changing pattern of division of responsibilities in marriage, the courts will be engaged in a continuing process of awarding spousal support at a level appropriate to the particular circumstances of each relationship.

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